IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2007 Session

JENNIFER (CRUM) JONES v. JOHNNY L. CRUM

Appeal from the Circuit Court for Greene County
No. 01CV640 Thomas J. Wright, Judge

No. E2006-02420-COA-R3-CV - FILED MAY 31, 2007

Mother and Father were divorced in 2001, at which time they agreed to share custody of their two children on an alternating week basis. In 2006, Mother filed a petition to modify the decree by naming her primary residential parent and increasing her parenting time. Following mediation, the parties submitted a mediated agreement and Temporary Parenting Plan, which substantially increased Mother's parenting time, to the trial court for approval. The trial court refused to enter the agreement, primarily because it did not provide for child support in accordance with this state's Child Support Guidelines. Following a hearing, the trial court denied Mother's petition, finding that there was no material change in circumstance that would justify a change in custody. Mother appeals. After careful review, we find no error and affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Edward L. Kershaw, Greeneville, Tennessee, for the Appellant, Jennifer (Crum) Jones.

Todd A. Shelton, Greeneville, Tennessee, for the Appellee, Johnny L. Crum.

OPINION

I. Background

Jennifer (Crum) Jones ("Mother") and Johnny L. Crum ("Father") were divorced on October 1, 2001. They are the parents of two minor children, Breanna Crum (born June 15, 1993), and Daniel Crum (born August 5, 1997). A Permanent Parenting Plan (the "2001 Plan") was incorporated into the divorce decree, which provided that Mother and Father would alternate custody

of the children on a weekly basis. The 2001 Plan also provided that neither party would pay child support because the parents had equal visitation time with the children. Father was responsible for paying Daniel's day care expenses, and Mother paid for the children's health insurance. Father married Cheryl Crum in 2002. Mother also remarried following the parties' divorce.

On July 17, 2006, Mother filed a Petition to Modify Parentage Arrangement, requesting that the Court make Mother the primary residential parent and allow Father visitation privileges, instead of the parents sharing custody, as the 2001 Plan mandated. In her petition, Mother alleged the following, *inter alia*:

> 7. Both children have expressed to Mother repeatedly, and it is believed they will tell the Court, that they absolutely do not get along with their new stepmother and do not want to be around her;
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> 8. Both children have expressed to their Mother, and it is believed they will express same in Court, that their Father no longer participates in their lives, but rather, leaves them primarily with their step-mother [sic] to whom they do not get along;
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> 9. Both children have expressed that they are very anxious when it comes to visiting their Father and it is something they no longer desire to do on an extended basis;
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> * * *
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> 11. Mother has talked with Father about the fact that he does not involve himself in the children's lives to the point where from time to time he does not get them to their extracurricular activities because either he forgets or he simply is not concerned. Additionally, Father will not allow the children to participate in extracurricular activities because he refuses to take them;
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> 12. Recently, Breanna Crum was kicked off the cheerleading squad because her Father repeatedly and regularly would not get her to cheerleading practice on time. Upon information and belief, this is reflective of Father's attitude with regard to virtually all of the children's activities . . . .

Father filed a response to Mother's petition, and the parties engaged in limited discovery. On September 12, 2006, the parties participated in mediation and reached a temporary agreement regarding custody of the children. The proposed "Temporary Parenting Plan" submitted to the trial court for approval provided that Mother would be the children's primary residential parent, and Father would have visitation with the children every other weekend and every Wednesday night.

The Temporary Plan further provided that: "The parties agree that no child support will be paid at this time as the children will be adequately supported by both parents as in the past." It also specified that Mother would receive the tax exemptions for both Breanna and Daniel beginning in 2007, "provided that Father is not paying child support. Court will decide issue of tax deduction if Father begins paying [child support] according to the guidelines." As with the 2001 Plan, Father was responsible for paying Daniel's day care expenses, and Mother maintained health insurance for both children. The handwritten mediation agreement signed by Mother, Father, and their attorneys, which was presented to the trial court with the Temporary Parenting Plan and the mediator's report, included the following provision: "It is agreed that this Agreement is on a temporary basis, and either party may bring this matter back to the attention of the Court at any time to request permanency, modification, or dissolution."

The parties submitted a proposed Agreed Order to the trial court for approval, which included the Temporary Parenting Plan agreed upon by the parties at mediation. On September 15, 2006, the trial court entered an order rejecting the proposed plan and setting the matter for trial. The trial court stated that it was "unwilling to approve that Agreed Order because it does not contain a child support obligation, does not contain a child support worksheet, and does not finally dispose of the case so the file may be closed by the clerk."

On October 11, 2006, the trial court conducted its hearing regarding Mother's Petition to Modify Parentage. Mother, Father, Mrs. Crum, and both children testified. After considering all of the evidence, the trial court found that there had been no material change in circumstances justifying a change in the parentage arrangement and ordered that the 2001 Plan remain in effect, as it was in the best interest of the children. Mother appeals.

II. Issues Presented

The issues presented for our review are:

> 1. Whether the trial court erred in not entering the mediated agreement of the parties; and
>
> 2. Whether the trial court erred in not modifying the parentage arrangement such that primary parentage of the two minor children is placed with Mother.

III. Standard of Review

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable

deference must be accorded to the trial court's factual findings. ***Seals v. England/Corsair Upholstery Mfg. Co., Inc.,*** 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are accorded no presumption of correctness. ***Campbell v. Florida Steel Corp.,*** 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

The paramount concern in a child custody case is the welfare of the child. ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001). The Supreme Court has noted that "the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge." *Id.* at 85 (quoting ***Edwards v. Edwards***, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). Appellate courts will not interfere with a trial court's custody decision unless it is shown that the trial court exercised its discretion in an erroneous manner. ***Koch v. Koch***, 874 S.W.2d 571, 575 (Tenn. Ct. App. 1993); ***Mimms v. Mimms***, 780 S.W.2d 739, 744-45 (Tenn. Ct. App. 1989).

Under the abuse of discretion standard, we must uphold the trial court's ruling as long as reasonable minds could disagree about its correctness. ***DeLong v. Vanderbilt University***, 186 S.W.3d 506, 511 (Tenn. Ct. App. 2005). According to the Tennessee Supreme Court, "A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." ***Eldridge v. Eldridge,*** 42 S.W.3d 82, 85 (Tenn. 2001) (internal quotations omitted). Applying this standard, we are not permitted to substitute our judgment for that of the trial court. ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998).

IV. Analysis

A. Mediated Agreement

Mother contends that the trial court erred in not entering the mediated agreement proposed by the parties. The trial court declined to approve the agreement, which included a Temporary Parenting Plan, because the Temporary Parenting Plan did not include a provision for child support and it was not a permanent plan. We find no error in the trial court's decision.

As we have stated previously, "It seems abundantly clear that since time immemorial it has been the public policy of this state that a parent is under a duty to support his children." ***Witt v. Witt***, 929 S.W.2d 360, 362 (Tenn. Ct. App. 1996). Commensurate with this duty, the state has established laws and regulations regarding child support for minors. *See generally* Tenn. Code Ann. § 36-5-101, *et seq*.; Tenn. Comp. R. & Regs. 1240-2-4-.01, *et seq*. ("Child Support Guidelines"). We have noted that the Child Support Guidelines "have the force of law under a legislative mandate from which the courts are not authorized to deviate except in a manner that is allowed by the guidelines themselves." ***Gorrell v. Harris***, No. M2003-00629-COA-R3-CV, 2004 WL 2345663, at * 6 (Tenn. Ct. App. M.S., filed Oct. 15, 2004). Furthermore, Tenn. Code Ann. § 36-5-101 provides in pertinent part that:

> In making the court's determination concerning the amount of support of any minor child or children of the parties, the court shall

> apply, as a rebuttable presumption, the child support guidelines, as provided in this subsection (e). If the court finds that evidence is sufficient to rebut this presumption, the court shall make a written finding that the application of the child support guidelines would be unjust or inappropriate in that particular case, in order to provide for the best interest of the child or children, or the equity between the parties. Findings that the application of the guidelines would be unjust or inappropriate shall state the amount of support that would have been ordered under the child support guidelines and a justification for variance from the guidelines.

Tenn. Code Ann. § 36-5-101(e)(1)(A).

At the hearing on Mother's Petition to Modify Parentage, the parties' Child Support Work Sheet was entered as an exhibit. The work sheet indicated that on the basis of the parenting schedule proposed in the Temporary Parenting Plan, Father would owe a child support obligation of $372 per month according to the Child Support Guidelines. The Temporary Parenting Plan proposed by Mother and Father included no provision for payment of child support by Father, nor did it provide justification for a downward deviation from the amount prescribed by the guidelines. The Tennessee Supreme Court has stated that the child is the beneficiary of the child support payments made by the non-custodial parent. *Rutledge v. Barrett*, 802 S.W.2d 604, 607 (Tenn. 1991). Therefore, as a general rule, the custodial parent may not waive the minor child's right of support. *Norton v. Norton*, No. W1999-02176-COA-R3-CV, 2000 WL 52819, at *4 (Tenn. Ct. App. W.S., filed Jan. 10, 2000). In keeping with this precept, we have held that "agreements, incorporated in court decrees or otherwise, which relieve a natural or adoptive parent of his or her obligation to provide child support are void as against public policy as established by the General Assembly." ***Witt***, 929 S.W.2d at 363.

When parties stipulate to the amount of child support to be paid, such as in the mediated agreement and Temporary Parenting Plan proposed by Mother and Father in this case, the stipulations must be reviewed by the trial court for approval. Tenn. Comp. R. & Regs. 1240-2-4-.01(2)(b)(1)(i). Furthermore, "if the negotiated agreement does not comply with the [Child Support] Guidelines or contain the findings of fact necessary to support a deviation, the tribunal shall reject the agreement." Tenn. Comp. R. & Regs. 1240-2-4-.01(2)(b)(1)(ii). Thus, trial courts do not have the discretion to approve a private agreement for child support in contravention of the guidelines and state law. *See, e.g.*, ***Rushing v. Spain***, No. W2005-00956-COA-R3-CV, 2005 WL 2922440, at *1 (Tenn. Ct. App. W.S., filed Nov. 4, 2005); ***State ex rel. Mitchell v. Armstrong***, No. W2003-01687-COA-R3-JV, 2004 WL 2039811, at *4 (Tenn. Ct. App. W.S., filed Sept. 3, 2004).

Because the parties' mediated agreement, which included the Temporary Parenting Plan, failed to address the issue of child support in a manner consistent with the Child Support Guidelines and state law, we hold that the trial court did not err in refusing to approve it.

B. Petition to Modify Parentage Arrangement

Mother argues that the trial court should have granted her Petition to Modify Parentage Arrangement. We disagree with this argument, because the evidence does not preponderate against the trial court's finding that there was not a material change of circumstance justifying a change of custody.

As the Supreme Court has noted on several occasions, trial courts are vested with wide discretion in matters of child custody. ***Eldridge v. Eldridge,*** 42 S.W.3d at 85; ***Suttles v. Suttles***, 748 S.W.2d 427, 429 (Tenn. 1988). A determination of custody and visitation often hinges on subtle factors such as the parents' demeanor and credibility during the trial proceedings. ***Gaskill v. Gaskill,*** 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). Absent some compelling reason otherwise, considerable weight must be given to the trial court's judgment with respect to the parties' credibility and their suitability as custodians of children. ***Bush v. Bush,*** 684 S.W.2d 89, 94-95 (Tenn. Ct. App. 1984). In cases such as this, the welfare and best interests of the child are of paramount concern. Tenn. Code Ann. § 36-6-106(a); ***Koch v. Koch***, 874 S.W.2d at 575.

Tennessee Code Ann. § 36-6-601 provides as follows regarding requests for a change of custody:

> If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(B). Thus, the threshold inquiry for a trial court faced with a petition to modify the parties' parentage arrangement is whether a material change in circumstance has occurred. *See, e.g.*, ***Cowan v. Hatmaker***, No. E2005-01433-COA-R3-CV, 2006 WL 521492, at *4 (Tenn. Ct. App. E.S., filed March 3, 2006); ***Mulkey v. Mulkey***, No. E2004-00590-COA-R3-CV, 2004 WL 2412610, at *5 (Tenn. Ct. App. E.S., filed Oct. 28, 2004)***; Harris v. Harris***, 832 S.W.2d 352, 353 (Tenn. Ct. App. 1992); ***Woodard v. Woodard***, 783 S.W.2d 188, 189 (Tenn. Ct. App. 1989). The burden of proof is on the petitioner to establish such a change. Tenn. Code Ann. § 36-6-101(a)(2)(B). We have previously stated that to constitute a material change of circumstance as contemplated by the statute, "the change must occur after the entry of the order sought to be modified and the change cannot be one that was known or reasonably anticipated when the order was entered." ***Cowan***, 2006 WL 521492, at *4. Furthermore, the change must materially affect the child's well-being. *Id.*

In her petition, Mother alleged that Father failed to take the children to their extracurricular activities, that he did not spend much time with them at home, and that the children did not like their Father's wife. She testified to the same at trial, although she did admit that she had erroneously accused Father of being responsible for Breanna "recently"getting kicked off the cheerleading squad.[1] As would be expected, the testimony of Father and Mrs. Crum varied considerably from that of Mother. Father and Mrs. Crum both testified that the children were encouraged to participate in extracurricular activities and that they provided transportation to these activities when the children stayed with them. Mr. Crum said he and his wife also enjoyed doing things with the children as a family, such as playing outside, riding bicycles, and playing soccer. Mrs. Crum asserted that Father was very involved with the children, although she did concede that she picked the children up from school because Father's work schedule did not permit him to do so. Father and Mrs. Crum both testified that they shared responsibility for cooking meals for the family, helping the children with their homework, and cleaning up around the house. Mrs. Crum admitted that she did search Breanna's belongings periodically, but explained that it was because of a hygiene issue that has since been resolved, so the searches no longer occur. Counsel for Father also introduced several cards and letters written by the children to Mrs. Crum, indicating that the children loved her and thought she was a good mom.

The trial court also heard testimony from Breanna, age 13, and Daniel, age 9, outside the presence of their parents. Both children testified that the alternating week visitation schedule is difficult for them because they barely get settled at one house before having to move to the other parent's home. Daniel stated that he wanted to stay with his sister, and that Breanna had told him that the new visitation schedule proposed by Mother would be better for them. Breanna testified that she has more privacy and freedom at her Mother's house; that sometimes Father doesn't take her to cheerleading practice; that Father requires her to bring her textbooks home from school every night, regardless of whether she had homework; and that she is allowed to use the phone more often at her Mother's house. Breanna said that she and Mrs. Crum have a relationship that is sometimes close and sometimes not.

After considering all of the evidence, the trial court found that no material change of circumstance had occurred and therefore denied Mother's Petition to Modify Parentage. We agree. As we have stated previously, "a child's stated preference to live with one parent over the other, standing alone, cannot constitute a material change in circumstances as a matter of law." ***Mulkey***, 2004 WL 2412610, at *5. Mother's argument basically boils down to the children not liking their stepmother and wanting to spend more time at Mother's home. This, without more, is insufficient to warrant a change in custody. Our result in this case is consistent with our decision in ***Johnson v. Johnson***, where we stated as follows:

> The testimony of the witnesses, fairly distilled and summarized, produces this conclusion: the children and Ms. Johnson frequently get

[1]Mother conceded that this incident occurred several years ago, in fact, before Father married his current wife. Breanna is now involved in a different cheerleading program.

> into arguments and conflicts over her requests that they keep their rooms clean and do chores around the house. The children have expressed their desire to live with their father, perhaps for a number of reasons, but clearly also because they perceive that they will be given "more freedom" at Mr. Johnson's house. We do not find this to be an unusual situation for a household with two teenage children, and certainly not one warranting the "drastic remedy" of changing custody.

Johnson v. Johnson, No. E2006-01434-COA-R3-CV, 2006 WL 3718237, at *4 (Tenn. Ct. App. E.S., filed Dec. 18, 2006).

We find that the evidence does not preponderate against the trial court's conclusion that there was no material change of circumstance. Therefore, we affirm the trial court's judgment denying Mother's Petition to Modify Parentage.

V. Conclusion

After careful review, we hold that the trial court did not err in refusing to enter the parties' mediated agreement and also refusing to modify the parentage arrangement to designate Mother as the primary residential parent. We affirm the judgment of the trial court and remand for further proceedings consistent with this opinion. All costs of appeal are taxed against the Appellant, Jennifer (Crum) Jones.

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SHARON G. LEE, JUDGE